ZAIDIN ABD GHANI

v.

RAJA RAMAN NAIR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[CIVIL SUIT NO: D9-22-1907-2000]
10 MAY 2001

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - Conditions for granting - Whether there was abuse of court process - Whether there were serious or bona fide questions to be tried*

CIVIL PROCEDURE: *Injunction - Damages - Whether plaintiff had produced sufficient evidence of damages and losses and its nature and extent - Whether damages is an adequate remedy - Whether defendant would be adequately compensated by plaintiff's undertaking as to damages*

CIVIL PROCEDURE: *Injunction - Balance of convenience - Whether in favour of granting - Whether irreparable harm or damage could be caused to defendant which would place them in an irretrievable position incapable of remedy by way of damages by the plaintiff - Public interest - Whether public interest outweighed plaintiff's interest*

CIVIL PROCEDURE: *Injunction - Effect of non-disclosure of material facts - Whether non-disclosure was intentional - Whether plaintiff will be entitled to equitable relief*

CIVIL PROCEDURE: *Injunction - Non-joinder of parties - Whether non-joinder of certain interested parties fatal to plaintiff's application - Order 15 r. 4 Rules of the High Court 1980*

By a concession agreement, one Incofirm Sdn. Bhd. entered into an agreement with the state government of Sabah for some construction project. The rights of the concession agreement were novated to the fifth defendant. Following this, the plaintiff and one Rahim, entered into an agreement (the "S&P sgreement") for the purchase of 100 issued and paid up shares in the fifth defendant (the "Incofirm shares") from the first and second defendants. The S&P agreement which was subject to two conditions precedent, was subsequently terminated when the second condition precedent could not be fulfilled. Thereafter, the issued and paid up share capital of the fifth defendant was increased by 99,9000 shares. As a result of a dispute over the termination of the S&P agreement, three suits were filed between the parties; one of them was

filed by the plaintiff and Rahim against the first and second defendants (the "first suit"). Thereafter, the issued and paid-up capital of the fifth defendant was further increased to 5,000,000 shares.

Negotiations for settlement of the three suits between the parties in the relevant suits failed. The first and second defendants then entered into another sale and purchase agreement with Glory Mantra (M) Sdn. Bhd. ("Glory Mantra") for the sale of shares in the fifth defendant.

In this application under encl. 11, the plaintiff prayed for various interlocutory reliefs in the form of injunctions against the defendants.

The issues before the court were; (i) whether there was abuse of the court process by the plaintiff; (ii) whether damages is an adequate remedy; (iii) whether there were *bona fide* issues to be tried in respect of the plaintiff's cause of action; (iv) whether the balance of convenience favours the granting on the interlocutory injunction as prayed by the plaintiff; (v) whether the plaintiff has come to court with clean hands; (vi) whether plaintiff has provided valuable undertaking to pay damages; and (vii) on the issue of non-joinder of Rahim and Glory Mantra as parties to the proceedings.

Held:

[1] There is no indication why the present proceedings could not be filed for an interlocutory relief in the first suit. In the first suit, the plaintiff had obtained an *ex parte* interlocutory injunction which was subsequently set aside by the first and second defendants. It cannot be ruled out that fear of failure may have made the plaintiff not to file this application in the first suit as he had failed to defend the *ex parte* injunction.

[1a] It is also conceivable that encl. 11 was filed to pressure the first, second and third defendants to re-enter negotiations for settlement. Enclosure 11 was clearly a substantial procedural impropriety, which is an abuse of the court's process.

[2] If the plaintiff succeeds in establishing beneficial interest over the 100 shares, then any loss arising from the rights of the 100 shares suffered by the plaintiff and Rahim are quantifiable as damages. The plaintiff should, but has failed to produce sufficient evidence to show what are the damages or losses and its nature and extent that the plaintiff would suffer that; the plaintiff claimed; would render damages an inadequate remedy in this case. In the absence of such evidence, it is concluded that the plaintiff would be adequately compensated by damages.

[3] The S&P agreement was regarded as terminated because of the non-fulfilment of the second condition precedent. Further, the plaintiff could not claim beneficial interest on the 100 shares as no payment for the said shares were made by the plaintiff or Rahim. On this basis, there is no evidence to support any *bona fide* issue to be tried.

[4] The balance of convenience does not weigh in favour of granting an interlocutory injunction in terms of encl. 11 because it would extend to all 5,000,000 shares of the fifth defendant company which would be unjust, as the plaintiff is only entitled to claim beneficial interest, if any, over the 100 shares under the S&P agreement. Further, it would also affect the interest of Glory Mantra who purchased shares in the fifth defendant.

[4a] An interlocutory injunction would paralyse the fifth defendant's ability to raise funds to complete the project. This would cause its existing contractual obligations to be in jeopardy and may open itself to potential claim for damages from the relevant parties.

[4b] There is a real risk of termination of the concession agreement by the Sabah government. The risk would become a reality for the fifth defendant if injunction is granted in this application. This may cause irreparable loss and damages to the fifth defendant and cannot be compensated with damages by the plaintiff. In this respect, the injunction sought by the plaintiff is contrary to the development policy of the Sabah government and public interest.

[5] It was found that there had been material non-disclosure by the plaintiff when he applied for an *ex parte* interlocutory injunction previously and as well as in this present application. The non-disclosure was intentional and thus, will not entitle him to equitable relief as claimed in encl. 11.

[6] The plaintiff has merely provided a bare undertaking to pay damages in the affidavit in support. Further, the plaintiff has not produced any evidence to show that his undertaking to pay damages is any worth. It is clear that the plaintiff is unlikely to be able to pay any appreciable damages and therefore, no interlocutory injunction should be given.

[7] Since the plaintiff and Rahim entered into the S&P agreement as joint purchasers of the 100 shares in question, Rahim should be a party to the present proceedings. However, it must be pointed out that Glory Mantra has an interest in the shares of the fifth defendant. Thus, an interlocutory injunction, which has an adverse effect on the interest of

Glory Mantra, cannot be granted without its presence. Rahim should have in any event been joined as a plaintiff in this action pursuant to O. 15 r. 4 Rules of the High Court 1980. The non-joinder of Rahim and Glory Mantra is fatal to the plaintiff's application in encl. 11.

[Application dismissed with costs.]

Case(s) referred to:

Aberjoyle Plantations Ltd v. Khaw Bian Cheng [1960] MLJ 47 ***(refd)***
Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd [1995] 3 MLJ 417 ***(refd)***
Ali and Fahd Shoboksi Group Ltd v. Moneim [1989] 1 WLR 710 ***(refd)***
Alor Janggus Son Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 ***(foll)***
Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 ***(refd)***
Anwar Ibrahim v. Abdul Khalid Jafri Bakar Shah [1998] 3 CLJ Supp 177 ***(foll)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***
Brink's Mat Ltd v. Elcombe [1988] 1 WLR 1350 ***(refd)***
Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157 ***(foll)***
Dial Kaur Tara Singh v. Man Foong Realty Sdn Bhd [2000] 4 CLJ 93 ***(refd)***
Evercrisp Snack Products (M) Sdn Bhd v. Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 ***(refd)***
Garden Cottage Foods Ltd v. Milk Marketing Board [1984] AC 130 ***(refd)***
Hartecon JV Sdn Bhd v. Hartela Contractors Ltd [1997] 2 CLJ 104 ***(refd)***
Hussian Khamis v. Aishah Arof [1996] 2 BLJ 351 ***(refd)***
Jaafar Ibrahim v. Gan Kim Kin [1985] 2 MLJ 24 ***(refd)***
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 ***(refd)***
Kang Kok Kwang v. Bukit Baru Center Sdn Bhd & Ors [1991] 2 CLJ 789 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah [1995] 1 CLJ 293 ***(foll)***
London Passenger Transport Board v. Mascrop [1942] AC 332 ***(foll)***
Lyons Maid Limited v. Trebor Limited [1967] RPC 222 ***(refd)***
MBf Holdings Bhd v. East Asiatic Company (Malaysia) Bhd [1995] 4 CLJ 73 ***(refd)***
Morning Star Co-operative Society Ltd v. Express Newspapers Ltd [1979] FSR 113 ***(refd)***
Ng Ben Thong v. Krishnan Arumugam [1998] 5 MLJ 579 ***(refd)***
North Stafford Steel Iron and Coal Company (Burslem) Ltd v. Ward [1868] LR 3 Exch 172 ***(refd)***
Ong Lian Shyang v. Hoover Mutiara Sdn Bhd [2001] 1 CLJ 141 ***(foll)***
Paire v. Hutchinson [1868] 3 LR 388 ***(foll)***
Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 ***(refd)***
Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd [2000] 1 CLJ 695 ***(refd)***
Tetvosyl Ltd v. Silver Paint & Laquer Company Ltd [1980] NLJ 786 ***(foll)***
The Siskiva [1979] AC 210 ***(foll)***
Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd [1987] 1 CLJ 474 ***(foll)***

UMBC v. Palm & Vegetable Oil Sdn Bhd [1983] 1 MLJ 206 ***(refd)***
Wah Long (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok [1975] 2 MLJ 109 ***(foll)***
Zinc Corporation (Limited) and Romaine v. Skipwith & Ors [1914] 31 TLR 107 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Specific Relief Act 1950, ss. 51, 54(h)
Rules of the High Court 1980, O. 15 r. 4(2), O. 29 r. 1

For the plaintiff - Norliza Md Hilal; M/s Onn & Partners
For the 1st, 2nd & 3rd defendants - George C Proctor; M/s YS Woo & Proctor
For the 4th defendant - KY Ho; M/s Ranjit Ooi & Robert Low
For the 5th defendant - Ben CC Chan; M/s Lee Hishamuddin

Reported by Raja Vishnu Sivarajah

JUDGMENT

Ramly Ali JC:

Introduction

This is an application by the plaintiff (Zaidin Abd Ghani @ Zaidin Stothard) in encl. 11 seeking for various interlocutory reliefs in the form of injunctions against the defendants by way of summons in chambers (*inter partes*) dated 8 November 2000. Through encl. 11, the plaintiff is seeking the following prayers:

(1) injunksi interim yang melarang dan mencegah Defendan Pertama, Kedua dan Ketiga, pekerja dan/atau ejen sesiapa sahaja daripada melanjutkan tindakan untuk berurusniaga dan/atau menjual saham-saham Syarikat Defendan Kelima kepada Defendan Keempat atau pihak yang lain sehingga tindakan-tindakan yang difailkan di Mahkamah iaitu Guaman S4-22-600-1999, Saman Pemula S4-24-1021-99 dan S3-24-1799-1999 ("Tindakan-tindakan Mahkamah") di dengar dan diputuskan dan/ataupun sehingga perintah injunksi interlokutori diperolehi (Prayer (a));

(ii) injunksi interim yang melarang dan mencegah Defendan Kelima (Incofirm) daripada menambah atau mengurangkan modal berbayarnya ("paid up capital") sehingga Tindakan-tindakan Mahkamah didengar dan diputuskan dan/atau sehingga Perintah Injunksi Interlokutori. (Prayer (b));

(iii) injunksi interim yang melarang dan mencegah kesemua pemegang-pemegang saham daripada menambah atau mengurangkan modal berbayar Defendan Kelima (Prayer (c)).

(iv) secara alternatifnya, memerintahkan ("to compel") Defendan Pertama dan lain-lain pemegang-pemegang saham untuk mengembalikan "*status quo*" saham-saham Defendan Kelima seperti sebelum bermulanya Tindakan-tindakan Mahkamah (Prayer (d)).

Background Of The Case

By a concession agreement dated 17 April 1997, a company known as Incofirm Sdn Bhd entered into an agreement with the States Government of Sabah ("the original concession agreement") whereby Incofirm Sdn Bhd would undertake to, *inter alia*, construct an underground duct system within Sabah ("the Sabah Duct System Project").

By a supplementary agreement dated 3 August 1998, the rights under the original concession agreement were novated to the 5th defendant ("the supplementary concession agreement"). The terms of the original concession agreement were incorporated into the supplementary concession agreement.

By a sale and purchase agreement dated 26 January 1999, the plaintiff and one Abdul Rahim Abdul Rahman ("Rahim") entered into an agreement for the purchase of 100 issued and paid up shares in the 5th defendant ("the Incofirm shares") from the 1st and 2nd defendants ("the S&P agreement"). The said S&P agreement was at all material times subject to two conditions precedent, namely:

(a) the appointment of Lucent Technologies (M) Sdn Bhd. ("Lucent") as a turnkey contractor ("1st condition precedent")

and

(b) the establishment of a joint venture between the 5th defendant and TNEC ("the 2nd condition precedent").

Clause 4(a) of the S&P agreement requires that the 1st and 2nd conditions precedent to be fulfilled within six months from the date of the agreement, that is on or before 26 July 1999 or **such extended period as the Purchasers may grant the vendors in writing**. It is further provided that if the 1st and 2nd conditions precedent are not fulfilled, then the S&P agreement shall be deemed terminated and the 1st and 2nd defendants shall forthwith refund the deposit paid by the plaintiff and Rahim free of interest.

On 7 June 1999 the 1st and 2nd defendants terminated the S&P agreement because the 2nd condition precedent could not be fulfilled. On 9 July 2000 the issued and paid up share capital of the 5th defendant was increased by 99,9000 shares.

As a result of dispute in respect of the termination of the S&P Agreement the following suits were filed:

(i) On 15 July 1999, the plaintiff and Rahim filed an Originating Summons in Kuala Lumpur High Court, suit No: S4-24-1021-1999 ("the 1st suit') against the 1st and 2nd defendant for, *inter alia:*

(a) a declaration that the S&P agreement was still valid and subsisting and

(b) specific performance of the S&P agreement:

(ii) On 26 August 1999, the 1st, 2nd 3rd and 5th defendants filed a writ of summons in Kuala Lumpur High Court Suit No: S4-22-600-1999 ("the 2nd suit") against the plaintiff and Rahim for, *inter alia*, a declaration that the S&P agreement has been lawfully terminated; and

(iii) On 4 October 1999, the plaintiff and Rahim filed an Originating Summons in Kuala Lumpur High Court, Suit No: S3-24-1799-1999 ("the 3rd suit") against the 1st and 2nd defendants for, *inter alia*, a declaration that the deed of termination of trust deed dated 3 August 1999 be set a side.

(the 1st 2nd and 3rd suits are collectively referred to as "the 3 suits").

On 14 June 2000, the 1st and 2nd defendants entered into another sale and purchase agreement for the sale of 60% of the issued and paid-up capital in the 5th defendant company to the 4th defendant ("the TAHB sale").

On 7 August 2000, the issued and paid-up capital of the 5th defendant was increased by 4,900,000 shares. As such the existing issued and paid-up capital of the 5th defendant is 5,000,000 shares.

There were negotiations for settlement of the three suits between the parties in the relevant suits. The attempt to settle the three suits however failed. On 15 September 2000 the 1st and 2nd defendants entered into another sale and purchase agreement with Glory Mantra (M) Sdn Bhd ("Glory Mantra") for the sale of the shares in the 5th defendant ("the GM sale'). On 10 October 2000 the plaintiff filed the present suit (encl. 1) seeking for, *inter alia*:

(i) a declaration that the plaintiff is entitled to beneficial interest to the Incofirm shares;

(ii) a declaration that the transfer of additional 5th defendant company shares to the 3rd defendant is null and void; and

(iii) damages for misrepresentation allegedly caused by the 4th defendant.

On 18 October 2000, the plaintiff obtained an *ex parte* order against, *inter alia*, the 5th defendant whereby the 5th defendant was restrained from increasing or reducing its paid up capital until the disposal of the three suits or hearing of the *inter partes* hearing.

The plaintiff now seeks an *inter partes* interlocutory injunction under encl. 11. At this juncture, a holding-over of the *ex parte* interlocutory injunction in terms of prayer (i), (ii) and (iii) of encl. 11 has been ordered against the defendants until the disposal of the *inter partes* hearing of the application.

Points of Distinction: Prohibitory And Mandatory Injunctions

With regards to the prayers sought by the plaintiff, it is necessary to point out that prayers (i), (ii) and (iii) are interlocutory prohibitory injunctions which have the effect of restraining the defendants from doing certain acts. Prayer (iv) when construed properly, is however, an interlocutory mandatory injunction which have the effect of compelling the defendants of doing an act ordered by the court. For interlocutory prohibitory injunctions (prayer (i), (ii) and (iii), the appropriate test to be applied is that as laid out in *Keet Gerald Francis Noel John v. Mohd Noor Abdullah* [1995] 1 CLJ 293 and *Alor Janggus Son Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461. As for an interlocutory mandatory injunction (prayers (iv), it is trite law that the court would not grant an interlocutory mandatory injunction, except in exception and extremely rare cases. The plaintiff must satisfy the court that the case is a "strong and clear case" and irreparable damages would be suffered in order to justify an application for an interlocutory injunction. This principle was decided in *Wah Long (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok* [1975] 2 MLJ 109; *Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd* [1987] 1 CLJ 474: and *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150. The distinction between the two type of injunctions (prohibitory and mandatory) was clearly explained by KC Vohrah J in *MBf Holdings Bhd v. East Asiatic Company (Malaysia) Bhd* [1995] 4 CLJ 73 at p. 75.

For the purpose of these judgments, I shall categorise them on the following grounds:

(i) Abuse of the court process;

(ii) Damages is an adequate remedy:

(iii) *Bona fide* serious issues to be tried;

(iv) Balance of convenience;

(v) Plaintiff must come to equity with clean hands;

(vi) Undertaking as to damages;

(vii) *Status quo*;

(viii) Non-joinder of parties;

As for prayer (iv) – i.e. for interlocutory mandatory injunction, another additional ground is to be included, i.e.:

i) Strong and exceptional case.

Abuse Of Court Process

The counsels for the defendants submitted there is an abuse of the court process by the plaintiff in filing encl. 11 in this suit. This is because the plaintiff should have filed the present application (encl. 11) for an interlocutory relief in the 1st suit, but has failed to do so. This is especially so when the plaintiff's intention in encl. 11 is to preserve the *status quo* of the Incofirm shares pending disposal of the 3 suits.

There is no indication as to why the present application could not be filed in the 1st suit. On the other hand, there are evidence to show that in the 1st suit, the plaintiff had obtained an *ex parte* interlocutory injunction dated 19 July 1999. However the said *ex parte* injunction was set aside by the 1st and 2nd defendants on 27 August 1999 relying on, *inter alia* non-disclosure of material facts by the plaintiff and Rahim.

It was perhaps the fear of failure, that made the plaintiff not to file this application (encl. 11) in the 1st suit as they had failed to defend the *ex parte* injunction dated 19 July 1999. That could also be the reason as to why the plaintiff had proceeded *ex parte* to obtain *ex parte* order on 18 October 2000 in this action, in this court, despite there are solicitors on records for the defendants in the three suits.

The plaintiff has admitted that he started this present action upon knowledge that the proposed settlement had failed. The plaintiff has also asserted that he has suffered loss as a result of subsequent sale of the shares in the 5th defendant company to other third parties. It is not inconceivable that encl. 11 is filed to pressure the 1st, 2nd and 3rd, defendants to re-enter negotiations for settlement.

I am of the view that this is a clear case of an abuse of court's process. In a similar case decided by the Court of Appeal, in *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533, the Court of Appeal criticised the respondent for filing a third suit in Shah Alam High Court for an *ex parte*

interlocutory injunction when the respondent could have done so in the Penang High Court where two other suits were still in existence. In this regard the Court of Appeal held such a conduct was procedural abuse and the injunctive relief was used as instrument of oppression. In setting aside the injunctive order granted by the High Court, Gopal Sri Ram JCA held:

> It is plainly an abuse of the Court's process where the relief at law or in equity, not to remedy a genuine grievance, but as an instrument of oppression.

In fact the present proceedings in this court constitute multiplicity of proceedings. In *Hussian Khamis v. Aishah Arof* [1996] 2 BLJ 351, Hussain was a defendant in a suit instituted by Aishah in Civil Suit No. 286. In that Civil Suit No: 286, Aishah obtained an interlocutory injunction. Hussain obtained an order to remove himself as a defendant in Civil Suit No 286. Hussain thereafter filed an originating summons to set aside the interlocutory injunction in Civil Suit No: 286. The court dismissed Hussain's application to set aside on the basis that the application amounted to "substantial procedural impropriety' and relied on s. 25(2) and para. 11 of the Schedule (Additional Powers of the High Court), Courts of Judicature Act 1964 in dismissing the application. It was held that Hussain should have filed an application to re-intervene and set aside the interlocutory injunction in Civil Suit No: 286. The court, in that case also held that there is multiplicity of proceedings and pursuant to para. 11 of the Schedule (Additional Powers of the High Court) to the Court of Judicature Act 1964, the court may dismiss or stay proceedings by reason of multiplicity of proceedings.

Similarly in our present case, the plaintiff ought to and should have filed the present application for an interlocutory injunction in the 1st suit if the plaintiff's intention was to preserve *status quo* of the Incofirm share pending disposal of the 1st suit. Instead the plaintiff had filed this application in this court in the guise of seeking *status quo*, pending adjudication of the issue of beneficial interest. The present application is clearly one of "substantial procedural impropriety." It is an abuse of court's process. Thus the plaintiff's application (encl. 11) could be dismissed with cost on this ground alone.

Damages An Adequate Remedy

The thrust of the plaintiff's claim in the 1st suit as well as in this action is about the 100 shares of the 5th defendant (the Incofirm shares) which were the subject matter of the S&P agreement dated 26 January 1999. The plaintiff claimed to have beneficial interest over the said 100 shares. If the plaintiff succeeds in establishing beneficial interest over the said 100 shares registered under the name of the 1st and 2nd defendant, the plaintiff would then be entitled to claim all rights following from the 100 shares such as payment of dividends and bonus shares, if any. In this regard, any loss arising from the

rights of the 100 shares suffered by the plaintiff and Rahim are quantifiable as damages. The plaintiff said that he would suffer losses and damages would not be an adequate remedy. To my mind, it is not sufficient for the plaintiff to say that damages would not be an adequate remedy. The plaintiff should, but has failed to produce sufficient evidence to show what are the damages or losses that the plaintiff would suffer that render damages an inadequate remedy in the circumstance of this case. The plaintiff should but has failed to show the nature and extent of damages or losses he would suffer or would have suffered. In the absence of those evidence, the logical conclusion is that the plaintiff would be adequately compensated by damages. The court also noted that the said 100 shares of the 5th defendant were purchased jointly by the plaintiff and Rahim. The fact that Rahim is not a party to the present proceedings dilutes any argument about the irreparable losses and damages if the reliefs were refused.

Further, the plaintiff has full knowledge of the increase in the issued and paid up capital of the 5th defendant company since middle of the year 2000 when the plaintiff had entered into negotiation for settlement.

The plaintiff and Rahim however did not oppose to the increase of the issued and paid up capital of the 5th defendant until October 2000 when the present action was filed. One should be doubtful of the plaintiff's assertions of alleged damages and losses when he has sat on his rights for such considerable period of four months. In the circumstances, the plaintiff ought to be estopped from saying that his alleged beneficial interest, if any, is prejudiced and irreparable damage would be suffered. In the circumstances, I do not think an injunction can be granted in this case, as s. 54(h) of the Specific Relief Act 1950, provides:

> 54. An injunction cannot be granted:
>
> (h) to prevent a continuing breach in which the applicant has acquiesced.

In *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150, the Federal Court held that if damages is an adequate remedy, then no interlocutory injunction should be granted. Further, it is also trite law that where there is no evidence of irreparable damages like in the present case, an interlocutory injunction should be refused. (See: *Evercrisp Snack Products (M) Sdn Bhd v. Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *and Lyons Maid Limited v. Trebor Limited* [1967] RPC 222).

Again, on this ground alone, the plaintiff application (encl. 11) can be dismissed with costs.

Bona Fide Serious Issues To be Tried

The requirement of "*bona fide* serious issues to be tried" means that there must be a *bona fide* serious issue to be tried in respect of the plaintiff's cause of action, based on the totality of the facts presented before the court. This was in fact the tests applied in *Keet Gerald*'s case *(supra)* and *Ong Lian Shyang v. Hoover Mutiara Sdn Bhd.* [2001] 1 CLJ 141. In para. 1.1 to 1.8 of the plaintiff's written submissions, the plaintiff submitted that there were serious questions to be tried in this action. Looking closely at paras. 1.1. to 1.8 of the plaintiff's submissions, I find that they do not disclose what is the plaintiff's cause of action. As such, it is not clear as to what are the serious issues that need to be tried in this action. The grounds accorded by the plaintiff in para. 1.1 to 1.8 of the plaintiff's submissions are **not** serious issues to be tried. In fact, they are matters for consideration under the balance of convenience justifying a right to an interlocutory injunction. In this regard, it is trite law that a right to an interlocutory injunction by itself, is not a cause of action. Lord Diplock in *The Siskiva* [1979] AC 210 at p. 256 held:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on it's own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.

The above propositions were accepted as correct by the Court of Appeal in *Dial Kaur Tara Singh v. Man Foong Realty Sdn Bhd* [2000] 4 CLJ 93.

I shall now consider what are the plaintiff's causes of action in the present suit filed in this court on 10 October 2000 and to determine whether there are really *bona fide* serious issues to be tried in establishing the said causes of action. The issues to be considered for the purpose of an injunction must be real: must be *bona fide*; must be serious and must relate to the plaintiff's cause(s) of action. Based on the statement of claim and the affidavit filed by the plaintiff to support the application in encl. 11 it would appear that the plaintiff's causes of action are:

i) whether the plaintiff is entitled to a declaration on the issues of beneficial interest on the 100 shares ("1st cause of action");

ii) whether the plaintiff is entitled to a declaration on the issue of transfer of additional shares to the 3rd defendant ("2nd cause of action"); and

iii) whether the plaintiff is entitled to damages for misrepresentation allegedly caused by the 4th defendant ("3rd cause of action").

1st Cause of Action

In the present case, there are several reasons as to why beneficial interests over the 100 shares of the 5th defendant company would not arise. One such reason in that the S&P agreement was at all times a conditional contract. The fundamental terms and conditions of the said S&P agreement are as follows:

i) the S&P agreement is at all times subject to the fulfillment of the 1st and 2nd conditions precedent within six months or such other period that may be extended by the plaintiff and Rahim in writing to the 1st and 2nd defendants;

ii) if the 1st and 2nd conditions precedent are not fulfilled, then the said S&P agreement shall be deemed to have terminated;

iii) time is the essence of the contract;

iv) the S&P agreement constitutes the entire agreement between the parties and no amendment and variation shall be effective unless made in writing and signed by all parties.

It is trite law that in the event a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date and time is not to be extended by reference to equitable interest: (see *Aberjoyle Plantations Ltd v. Khaw Bian Cheng* [1960] MLJ 47 and *Jaafar Ibrahim v. Gan Kim Kin* [1985] 2 MLJ 24).

In the present case, the 2nd condition precedent was not fulfilled or not being able to be fulfilled when on 7 June 1999, TNEC replied and stated that TNEC was not interested in participating in the joint venture in the Sabah Duct System Project with the 5th defendant. (exh. R – 14B of encl. 20). There was no evidence to show that the plaintiff and Rahim have complied with the condition to extend the time for fulfillment of the 2nd condition precedent in writing. Thus cl. 4(c) of the S&P agreement was brought into automatic operation. Clause 4(c) provides that in the event the 2nd condition precedent is not fulfilled within the period of six months, then the agreement "shall be deemed to have been terminated".

As the above cl. 4(c) is a "deeming provision", the entire S&P agreement is deemed to have been terminated upon the non-fulfillment of the 2nd condition precedent. The effect of a "deeming provisions" is clearly explained by the Supreme Court in *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1. In that case Mohamed Dzaiddin Hj Abdullah SCJ (now CJ), held that:

> On the meaning of the words "shall be deemed" in cl. 17, it would seem clear to us that from the authorities that they mean "shall be regarded as."

Since the 2nd condition precedent was not fulfilled and the S&P agreement is deemed (regarded as) terminated, I am of the view that the plaintiff cannot possibly claim any beneficial interest of the 100 shares, because such claim pre-supposes the existence of the S&P agreement, which in the circumstance has been terminated, due to non-fulfillment of the 2nd condition precedent.

Furthermore the purchase price for the said 100 shares under the S&P agreement had not been paid by the plaintiff as conceded by the plaintiff in his own affidavit (encl. 30 B para 10). It is a general principle of law that a purchaser of shares is entitled to claim beneficial interest over the same upon the entering of the contract of sale and also provided purchase price or purchase consideration has been paid. This principle was decided in 1868 in the case of *Paire v. Hutchinson* [1868] 3 LR 388. Thus in our present case, the plaintiff cannot claim beneficial interest on the 100 shares because no payment had ever been made yet by the plaintiff or Rahim. If at all payment or part payment for the said 100 shares were made, the most the plaintiff is entitled to is to get back those payment from the defendants. This is clearly provided under cl. 4(c) of the same S&P agreement that "all deposit paid by the plaintiff and Rahim shall be repaid without interest."

This shows that for all intents and purposes, there is no intention that any beneficial interest ought impliedly or expressly to pass to the plaintiff and Rahim in the event of a termination under cl. 4(b) of the S&P agreement. In the circumstance, it is not possible for beneficial interest to arise in respect of the said 100 shares of the 5th defendant company. It must be noted that it is the intention of the parties that the said S&P agreement constitutes the entire agreement between the parties therein. This is made clear by the "entire agreement clause" in cl. 16 thereof. Clause 4(c) is an express provision on the consequences that follow in the event the S&P agreement is deemed terminated. It must also be noted that there is no provision for the plaintiff and Rahim to maintain any beneficial interest in the event of termination. In this regard I am of the view that the doctrine of *"expressio unius est non exclusio alterius"* applies, that is where a contract expressly mention something, it is often to be inferred that other things of the same general category which are not expressly mentioned were deliberately omitted. (see: *North Stafford Steel Iron and Coal Company (Burslem) Ltd v. Ward* [1868] LR 3 Exch. 172). The plaintiff having agreed the terms of the sale of the 100 shares and the consequence that follows if the conditions precedents are not fulfilled, cannot now argue that he is entitled to assert a claim of beneficial interest in respect of the said 100 shares.

I am satisfied that there is no evidence to support any *bona fide* serious issue to be tried in respect of the 1st cause of action i.e. the plaintiff's claim for a declaration on the issue of beneficial interest on the 100 shares. In this regard, Lawton LJ in *Tetvosyl Ltd v. Silver Paint & Laquer Company Ltd* [1980] NLJ 786 held that:

> A serious question to be tried ... can only arise if there is evidential backing for it. The Court has to consider whether the evidence provides its essential backing ... the real evidence in the case, namely, the articles which are in dispute, provide no backing at all for the alleged serious question.

2nd Cause Of Action

The 2nd cause of action is the plaintiff's claim for a declaration on the issue of transfer of additional shares to the 3rd defendant. In order to support a contention that the transfer of the additional new shares of the 5th defendant company to the 3rd defendant or any third party is invalid there must be some evidence that the said transfer was somehow contrary to the provisions under the law or the articles of associations of the 5th defendant company.

An examination of the statement of claim would clearly show that there are no facts pleaded as to why the transfer of shares in the 5th defendant company is legally invalid. There's also no evidence in the affidavit explaining why the said transfer was invalid. Pleadings in the statement of claim would not amount to evidence (see: *Ng Ben Thong v. Krishnan Arumugam* [1998] 5 MLJ 579). Even if there are affidavit evidence to this effect, such affidavit evidence cannot be used to improve the pleadings in the statement of claim. (see: *UMBC v. Palm & Vegetable Oil Sdn Bhd* [1983] 1 MLJ 206). In *Kang Kok Kwang v. Bukit Baru Center Sdn Bhd & Ors* [1991] 2 CLJ 789, Wan Adnan Ismail J (now CJM) held that a bare assertion does not support a serious question to be tried in an application for interlocutory injunction and affidavit cannot be used to improve the statement of claim during the hearing of an application for interlocutory injunction.

3rd Cause Of Action

The 3rd cause of action should not be considered at this stage of the proceeding because it is an action by the plaintiff against the 4th defendant (only) for misrepresentation. This is clearly stated in prayer (iii) of the statement of claim where the damages is against the 4th defendant. Clearly this cause of action could not entitle the plaintiff to the relief sought in the application (encl. 11) as it is not one of the prayers sought by the plaintiff in encl. 11.

No *Bona Fide* Serious Issue To be Tried

On the above considerations, I am of the view that there is no real *bona fide* serious issues that need to be tried in this application. On this ground alone, the plaintiff's application (encl. 11) could be dismissed with costs. However, assuming I am wrong in coming to this findings, the fact that there are *bona fide* serious issues to be tried in this application, is not by itself, an automatic "passport" to grant the injunction. In *Keet Gerald*'s case *(supra)*, the Court of Appeal held that:

> If he (the judge) finds, upon a consideration of all the relevant materials before him, including submissions of counsel, that no serious questions is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on the next step of his enquiry.

The next step of enquiry referred to by the court in that case is to consider where the justice of the case lies or the balance of convenience. In that case, the court also held that, in making this assessment, "the court must take into account all relevant matters, including the practical realities of the case. The court must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. If after weighing all matters, the court come to a conclusion that the plaintiff would suffer greater injustice if relief is withheld, the court would be entitled to grant the injunction especially if the court is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if the court concludes that the defendant would suffer the greater injustice by the grant of the injunction, the court would be entitled to refuse relief".

Balance of Convenience:
Claims Over All Shares Of The 5th Defendant

The plaintiff's claims are not strictly confined to the original 100 shares purchased under the S&P agreement. The plaintiff had applied for an interlocutory injunction over **all shares** in the 5th defendant company. If the claims are to be allowed, then it has an effect of encompassing all 5,000,000 issued and paid up shares of the 5th defendant company. The remaining 4,999,900 shares in the 5th defendant company would in fact belong to other shareholders. In this regard, it is to be mated that when the issued and paid up capital was increased by 99,900 on 9 July 2000, the said shares were allocated to the 3rd defendant; and when the issued and paid-up capital was increased by 4,900,000 on 7 August 2000 the same were allocated to the 1st and 2nd defendants. Further, part of the newly issued shares has become

the subject matter of the sale under GM sale. In this regard, the balance of justice or the balance of convenience does not weigh in favour of granting an interlocutory injunction in terms of encl. 11, because:

i) it would extend to all 5,000,000 shares of the 5th defendant company. (This would be wholly unjust as the plaintiff is only entitled to claim beneficial interest, (if any), over the 100 shares under the S&P agreement); and

ii) it would affect the interest of Glory Mantra (GM) who is the present purchaser of the shares in the 5th defendant under the GM sale. (It is also unjust to grant any interlocutory injunction when Glory Mantra (GM) is not named as a party to the present proceeding).

Financial Commitments Of The 5th Defendant

Financial commitments of the 5th defendant company must also be considered to determine the balance of convenience in this case. Clause 10 of the original concession agreement and the supplementary concession agreement clearly state that the 5th defendant is "solely responsible" for the financing of the Sabah Duct System Project.

There are evidence produced by the 5th defendant that the company is presently applying for financing from RHB Sakura Merchant Bankers in November 2000. If an interlocutory injunction is granted, this would have an adverse effect on the 5th defendant's ability to apply for loan. This is because it is usual for a financial institution to require an increase in the paid-up capital of the company before a loan application is approved. This would have an adverse domino effect to the financial ability of the 5th defendant to carry out the project concerned. Since November 2000, the 5th defendant has incurred and is continuing to incur expenses for the Sabah Duct System Project. A summary of the 5th defendant's contractual obligations shows the extent of the 5th defendant's liabilities and need for financing:

i) the construction of a 20 KM duct in Tawau, Sabah has commenced from 15 November 2000 to 11 December 2000 with an accrued value of RM1 million. The value of the construction increases everyday;

ii) the 5th defendant has incurred costs to a value of USD $1 million for the technical drawings and blue prints prepared by KTK Telecommunications Co Ltd Japan;

iii) the appointment of B.I.G Communication Sdn Bhd as the turnkey contractor for the Sabah Duct System Project in a contract dated 8 December 2000 for the supply of technical services and materials wherein the 5th defendant is liable to pay B.I.G Communications Sdn Bhd a sum of RM34,739,850 for the services rendered; and

iv) the appointment of Konsepco Jelma Sdn Bhd in a contract for the supply of Transmission Equipment dated 8 December 2000 as supplier of fiber optic transmission equipment wherein the contract price shall not exceed USD $20 million.

An interlocutory injunction would paralyse the 5th defendant's ability to raise fund to complete the project. This would cause the existing contractual obligations of the 5th defendant with the relevant parties to be in jeopardy. This would inevitably open the 5th defendant to potential claim for damages for breach of contract by the aforesaid parties.

Risk Of Termination

If the 5th defendant fails to provide financing for the project, then the Sabah State Government is entitled, under the original concession agreement, and the supplementary concession agreement to terminate both the said agreements if the said agreements are terminated, the sole business of the 5th defendant would come to an end and its source of revenue would be lost. It is again thereafter that the 5th defendant would suffer inevitable consequences of being sued by the relevant parties for breach of contract. It the circumstances, the loss and damages that the 5th defendant will suffer are clearly irreparable and cannot be compensated with damages by the plaintiff.

As a result of the on-going dispute between the parties herein, the said project has been delayed for 3 1/2 years since the signing of the original concession agreement. Works have nevertheless commenced in November 2000 with the help on Glory Mantra when the shares in the 5th defendant company was sold to them. On 5 July 2000 the Sabah State Government required the 5th defendant to show cause as to why the original concession agreement and the supplementary concession agreement should not be terminated. On 21 July 2000 the 5th defendant replied to the show cause letter and managed to persuade the Sabah State Government not to terminate those agreements; and on 3 August 2000 the representative appointed by the Sabah State Government as a director in the 5th defendant company had stressed that the said project has entered into "injury time". There is a real risk of termination of the agreements by the Sabah State Government. These risks will become reality if injunction is granted in this application.

Damages To The Sabah State Government

Damages to the Sabah State Government must also be considered in determining the balance of convenience in this case. The original concession agreement and the supplementary concession agreement provided that the 5th defendant is entitled to rent out all duct system constructed to telecommunication companies; and the Sabah State Government shall receive 5% of all revenue collected from the rental of the duct system; the concession is for a period of 30 years.

In the circumstances, any delay in the completion of the said project would inevitably cause a reduction in the revenue to be collected by the state government. Based on a valuation report prepared by M/s. Deloitte Touche Tohmatsu on 17 November 1999, when the project is completed, the 5th defendants is estimated to earn an average projected profit of RM20 - RM70 million for the first 16 years. As such any delay in completing the said project would cause substantial loss of revenue to the Sabah State Government as well.

Public Interest

Gopal Sri Ram JCA in the case of *Keet Gerald (supra)* had indicated that in determining the balance of justice in an application for injunction, "any question going to the public interest may, in appropriate cases, should be taken into account". The issue of public interest has also been taken into account by Mohd Noor Ahmad J in *Anwar Ibrahim v. Abdul Khalid Jafri Bakar Shah* [1998] 3 CLJ Supp 177. In our present case, the intention of the Sabah State Government under the concession agreement, is to provide an underground duct system for the use of telecommunication lines in Sabah. If injunctions are granted, it would undermine the said intention and thus would infringe public interest in ensuring an underground duct system for the use of telecommunication lines in Sabah. It is trite law that where there is a risk that public interest may be adversely affected, interlocutory relief in the form of injunction in usually not allowed. In *Tenaga Nasional Berhad v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695, the Court of Appeal held that an injunction, which has the effect of stamping provision of electricity, is contrary to public interest. In such circumstances, it was also held that public interests outweighed private interest. So, in our present case, I am also of the view that the injunction sought by the plaintiff is contrary to the development policy of the Sabah State Government and public interest.

So, based on the above considerations I am satisfied that the balance of convenience does not favour the granting on the interlocutory injunction as prayed by the plaintiff.

Plaintiff Must "Come With Clean Hands"

Injunction relief is equitable in nature. Therefore the maxim "he who comes to equity must come with clean hands" applies. In order to do that, the plaintiff must disclose all material facts. The court finds that there has been material non-disclosure by the plaintiff when he applied for an *ex parte* interlocutory injunction on 18 October 2000 as well as in this present application (encl. 11). In particular the plaintiff failed to disclose that:

i) the 1st and 2nd conditions precedent as required by the S&P agreement, were not fulfilled;

ii) one Yeoh Lam Jit was at all material times the principal to the plaintiff and Rahim;

iii) the 1st and 2nd non-disclosure (above) were issues raised by the 1st and 2nd defendants in an application to set aside an *ex parte* order for an interlocutory injunction obtained by the plaintiff and Rahim on 19 July 1999 in the 1st suit in Kuala Lumpur High Court (civil 4).

The 3rd non-disclosure above, is very material to the present case. The effect of Rahmah Hussain J's decision in allowing the application to set aside the *ex parte* order dated 19 July 1999 in the 1st suit (civil court 4) gave rise to *res judicata* in respect of the 1st, 2nd and 3rd non-disclosures in this present case. In *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 Peh Swee Chin FCJ held:

> What is *res judicata*? It simply means a matter adjudged, and its signifance lies is its effect of creating an estoppel *per rem judicatum.* When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata,* because the judgment becomes the truth between such parties, or in other words, the parties accept it as the truth; *res judicata pro veritate acceptor* ... .

In *Hartecon JV Sdn Bhd v. Hartela Contractors Ltd* [1997] 2 CLJ 104, Gopal Sri Ram JCA held that:

> When a matter, whether on a question of fact or law, has been decided between two parties in one suit or proceeding and the decision is final, neither party will be allowed in future or proceeding between the same parties to canvass the matter again.

Was the non-disclosure by the plaintiff innocent? In *Ali and Fahd Shoboksi Group Ltd v. Moneim* [1989] 1 WLR 710, the court held that the issues as to whether the non-disclosure of material facts must be considered in cases of

this nature. Mervyn Davies J in that case held that based on the facts of the case, the court cannot regard the non-disclosure as "innocent" as one may readily infer that there was an intention not to disclosure the relevant facts. The learned judge was following the definition of the word "innocent non - disclosure" as laid down earlier in *Brink's Mat Ltd v. Elcombe* [1988] 1 WLR 1350 as "one where there was no intention to omit or withhold information which was thought to be material". In our present case, I feel that the non-disclosure on the three issues (earlier cited) was not done unintentionally. Although the plaintiff had disclosed the existence of the 1st suit, the plaintiff had for unexplained reasons failed to disclose the dismissal of the *ex parte* order obtained by the plaintiff and Rahim in the 1st suit. It must also be noted that all the three non-disclosures cited above, occurred not just in the plaintiff's *ex parte* application in this suit but also prevailed in the present *inter parties* application in encl. 11.

Jurisdiction of the court to grant an interlocutory injunction is derived from the following statutory provisions:

(a) section 25(2) and para. 6 of the Schedule (Additional Powers of the High Court), Courts of Judicature Act 1964 which reads:

> Power to provide for interim preservation of property the subject matter of any cause or matter by sale or **by injunction** or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever.

(b) Section 51(1), Specific Relief Act 1973 which says:

> Temporary injunction are such as are to continue until a specified time, or until further order of the Court. They may be granted at any period of the suit and are regulated by law of civil procedures.

(c) Section 51(1), Specific Relief Act 1973 must therefore be read with O. 29 r. 1(1) of the Rules of the High Court 1980.

Based on the aforesaid provisions, it is clear that a court only has the jurisdiction to grant an interlocutory injunction in order to preserve the status quo of a subject matter of litigation pending before it, and not litigation pending in other suits in different court. The effect of the injunction order to be given by this court is to usurp the judicial functions of another court. This was specifically frowned upon by the Court of Appeal in *Jasa Keramat*'s case *(supra)* where Gopal Sri Ram JCA held where the conduct of the parties amount to an intrusion by one branch of the High Court into the conduct of proceedings that were plainly within the control and supervision of another branch, it is an abuse of the court process.

The plaintiff act of not disclosing material facts to this court continues until today as encl. 11 seeks an interlocutory relief until final disposal of the three suits as well. To date, the plaintiff has not made any application to amend encl. 11 or to bring to the attention of the court of the actual effect of encl. 11. Instead, the plaintiff has prosecuted encl. 11 with full march in order to hoodwink this court into granting another order similar to the earlier *ex parte* order. In the premise, I am convinced that the plaintiff's inequitable conduct and unclean hands should not entitle him to the equitable reliefs claimed in encl. 11. This is because the principles are clear. "He who comes to equity must come with clean hands".

Undertaking As To Damages

It is also trite law that an applicant for interlocutory injunction must provide valuable undertaking to pay damages. Further the applicant must show that he has means to fulfil the said undertaking. Gopal Sri Ram JCA in *Keet Gerald*'s case *(supra)* ruled that:

> Apart from such cases, the judge is entitled to take into account the Plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the Plaintiff to secure his undertaking, for example by providing a bank guarantee.

In our present case, the plaintiff has merely provided a bare undertaking to pay damages in the affidavit in support. The plaintiff has not even produced any evidence to show that his undertaking to pay damages is of any worth, despite being challenged by the defendants. Shanker J in *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157 had said:

> In the light of the materials before me I was satisfied that the undertaking as to damages given by the first Plaintiff was a barren one because although challenged, he had not responded with any evidence of mean.
>
> Once again, unless there was some evidence of means the inquiry would have been an exercise in futility.
>
> A bare undertaking as to damages may be 'usual' as to form, but useless as to content unless the Plaintiffs are worth powder and shot. I therefore hold it to be the right of the defendants to be told what the undertaking is worth in real terms.

On the other hand, the defendants have produced evidence to show that the plaintiff is in fact presently facing three pending bankruptcy proceedings by financial institutions for judgment sums of RM60,729.72, RM48,358.98 and RM119,159.09. It must be borne in mind that in the event the defendants (particularly the 5th defendant) suffer any loss as a result of the interlocutory

injunction, the loss would be in terms of hundred of millions of Ringgit. The losses which the 5th defendants are likely to suffer is evidenced by the projected earnings contained in the valuation report prepared by Messrs. Deloitte Toche Tohmatsu.

If the plaintiff is unable to pay sums of RM60,729.72, RM48,358.98 and RM119,159.09 to the financial institutions, what assurance is there that the plaintiff is able to pay damages of millions of Ringgit that the defendants are likely to suffer. Thus, based on the facts and the authorities cited above, my conclusion on this issue is just like what Foster J in *Morning Star Co-operative Society Ltd v. Express Newspapers Ltd* [1979] FSR 113 had ruled:

> An undertaking as to damages if the Plaintiff loses the action is the price which a person asking for interlocutory injunction has to pay and it is only in very exceptional circumstances that the Court will dispense with such an undertaking. No special circumstances were suggested here. But where the damage cannot be quantified and it is clear that the Plaintiff is unlikely to be able to pay any appreciable damages, no interlocutory relief should be given.

Maintaining *Status Quo*

The plaintiff has asserted that the interlocutory injunction relief is necessary for the preservation of *status quo*. It is however not clear as to what is the period of *status quo* that the plaintiff is asserting in the present case.

What is "*status quo*" for the purpose of granting an interlocutory injunction? The *status quo* is the existing state of affairs; but since states of affairs do not remain static, this raises a query: existing when? In *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130, Lord Diplock stated:

> The relevant *status quo* which it was said in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, it is a counsel of prudence to preserve when other factors are evenly balanced, is a state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the Writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant *status quo*.

Based on the above proposition, it is clear that the question of *"status quo"* only arises when other factors (particularly the balance of convenience) are evenly balanced. It does not arise in cases (such as the present application) where the balance of convenience is more inclined to not granting the injunction.

Further, applying the principles in *Garden Cottage Foods (supra)*, it is clear that the relevant period of *status quo* must be the period before the plaintiff filed an application for an *ex parte* interlocutory injunction against the defendants, that is 10 October 2000 (encl. 7). In this regard, as at that date, the shares of the paid up capital of the 5th defendant had already been increased to 5,000.000 from its original 100 shares. There are evidences to show that the plaintiff knew about the increase of the paid-up capital in the 5th defendant company in the middle of 2000 when the 4th defendant proposed a negotiation for a settlement of the three suits. At all times, it is clear that the plaintiff and Rahim did not protest to the increase of the paid-up capital of the 5th defendant. If that is the case, the relevant *status quo* to be maintained should be the state of affairs of the 5th defendant at or immediately before 10 October 2000. It is difficult and unjust to change the *status quo* as requested by the plaintiff (i.e. to go back to the original 100 paid up shares of the 5th defendant) because part of the shares in the 5th defendant has been acquired by Glory Mantra (GM) and the board of directors has also changed. The control of the 5th defendant has been rested with 3rd parties.

Strong And Exceptional Case

The test for an interlocutory mandatory injunction (as in prayer (iv) of encl. 11), is that the case ought to be "usually strong and clear" and irreparable damage would be suffered by the plaintiff if the interlocutory mandatory injunction is not granted. Abdoolcader J in *Wah Loong (Jelapang) Tin Mines Sdn Bhd v. Chia Ngen Yiok* [1975] 2 MLJ 109 ruled that "an interim or interlocutory mandatory injunction is never granted before trial except in exceptional and extremely rare cases". In *Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd* [1987] 1 CLJ 474, the Supreme Court (at that time), held that:

> the court has a discretion to grant an interlocutory mandatory injunction before trial but the discretion must be exercised and an injunction granted only in exceptional and extremely rare cases. The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the Plaintiff's interest be protected by the immediate issue of an injunction, otherwise irreparable injury and inconvenience would result.

Applying the above test to our present case, I find no evidence to support that the plaintiff's case is really "exceptional and extremely rare case". There is no extraordinary and strong justification to support the plaintiff's application for an interlocutory mandatory injunction as in prayer (iv) of encl. 11.

Non-Joinder Of Parties

The issue of non-joinder of parties was also raised by the defendants. The defendants contended that interlocutory relief should not be allowed on the ground of non-joinder of Rahim and Glory Mantra as parties to the present proceedings.

The court is of the opinion that Rahim should be a party to the present proceedings because the plaintiff and Rahim entered into the S&P agreement as joint purchasers of the 100 shares in question. As such, the plaintiff, cannot by himself alone, seek a declaration on the issue of beneficial interest on the said 100 shares as well as the issue of transfer of additional shares to the 3rd defendant in the present suit without joining Rahim. Similarly the plaintiff alone, is not entitled to seek interlocutory injunction to preserve the paid-up share capital of the 5th defendant pending adjudication of the above issues of beneficial interest and share transfer.

With regards to Glory Mantra, it must be pointed out that Glory Mantra has purchased substantial amount of shares in the 5th defendant from the 1st and 2nd defendants. Thus, Glory Mantra has an interest in the shares of the 5th defendant. In the circumstances, an interlocutory injunction, which has an adverse effect on the interest of Glory Mantra, cannot be granted without the presence of Glory Mantra. In *Zinc Corporation (Limited) and Romaine v. Skipwith & Ors* [1914] 31 TLR 107, the English Court of Appeal, in considering the same issue, held that:

> The Court was faced with the difficulty that whatever the decision might be it would be given in the absence of the other party to the contract. It would be idle to say that there would not be some prejudice to Hirsch and Sohn by the decision and by the trial of the action without having the Hirsch and Sohn before the Court or without having Hirsch and Sohn before the Court. The action did not lie and consequently the appeal must be allowed without dealing the question before Mr. Justice Sargant, because the judgment pronounced by him ought not to have been given, and when he granted an interlocutory injunction he was doing it in the absence of Hirsch and Sohn, and the order could not stand. The Court did not overlook the technical difficulties in the way, but it had to take care that no injustice was done to parties who had not had an opportunity of presenting their case or of being heard in any way. The appeal must be allowed and the interlocutory injunction discharged.

In *London Passenger Transport Board v. Mascrop* [1942] AC 332 Viscount Maugham held that:

> except in very special circumstances, all person interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made.

Although the rule laid down in that case was in the context of application for declaratory relief, the Malaysian Court of Appeal in *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417 had held that this is a rule of general application.

Based on the above authorities, Rahim ought to be made a party to the present proceedings because:

i) in order to determine the question of beneficial interest, the defendants are entitled to evidence from Rahim as to how and whether he is entitled to a beneficial interest over the 100 shares; and

ii) if an interlocutory injunction is granted, then Rahim would indirectly be entitled to benefit from the interlocutory injunction but he gives no undertaking as to damages to the defendants in respect of the same.

Similarly, Glory Mantra ought to be made a party to the present proceedings because:

i) the plaintiff's interlocutory injunction would have an adverse effect on the interest of Glory Mantra. (Glory Mantra ought to be given every opportunity to be heard in the present instance); and

ii) prayer (iii) of encl. 11 i.e. to prohibit **all shareholders** from increasing or reducing the paid up capital of the 5th defendant company has a direct and adverse effect on Glory Mantra as it is a shareholder of the 5th defendant.

No attempt was made by the plaintiff to join Rahim and Glory Mantra as parties to the present proceedings. When the issue was raised, the plaintiff merely averted that he was authorised by Rahim to 'institute' this action and exhibited a letter from Rahim dated 28 March 2001. Looking at the letter, I find that it does not state that the plaintiff is authorised to institute proceedings on behalf of Rahim. The said letter merely requested the plaintiff to "take over conduct of the court case involving Incofirm" and not specifically to institute the present proceedings. In fact, the letter is ambiguous as to which 'court case' Rahim was referring to because the 1st Suit (Civil Court 4) and the 2nd Suit (Civil Court 4) also involve the 5th defendant (Incofrim). Even if the plaintiff was so authorised, Rahim should have in any event been joined as a plaintiff in this action pursuant to O. 15 r. 4(2), Rules of the High Court 1980, which reads:

> Where the Plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled **must**, subject to the provisions of any written law and unless the Court gives leave to the contrary,

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be parties to the action and any of them who does not consent to being joined as a Plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.

Relying on the above authorities, I am of the view that the said non-joinder of Rahim and Glory Mantra to the present proceedings is fatal to the plaintiff's application as per encl. 11.

b

Conclusion

In the premise, I have no other alternative than to conclude that the plaintiff's application as per encl. 11, is dismissed with costs. Further to that I also order that the *ex parte* injunction dated 18 October 2000 and holding over order be discharged and the plaintiff to pay the defendants all damages arising from the granting of the *ex parte* injunction and holding over order, to be assessed by the SAR.

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